OVERRULED by State of California (Department of Corrections) (1995) PERB Decision No. 1100-S

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	
Charging Party,	)	Case No. S-CE-443-S
v.	)	PERB Decision No. 810-S
STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION),	)	June 4, 1990
Respondent.	)	

Appearance: Sam A. McCall, Jr., Chief Legal Counsel, for California Union of Safety Employees.

Before Craib, Shank, and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) of the Board agent's dismissal (attached hereto) of its unfair practice charge. In its charge, CAUSE alleged that the Department of Parks and Recreation (Department) violated the Ralph C. Dills Act (Dills Act) section 3519, subdivisions (a) and (b),[1] by denying one of its members,

[1] The Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519, subdivisions (a) and (b) provides:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Ranger Robert Murphy (Murphy), the right to representation at a meeting with a Department superintendent. The Board agent dismissed the complaint because he found that the matter was covered by the parties' memorandum of understanding (MOU) and, thus, should be deferred to arbitration. The facts, as presented by the Board agent, accurately reflect those alleged in the charge. We must accept those facts as true for purposes of determining whether a prima facie violation has been stated. (San Juan Unified School District (1977) EERB[2] Decision No. 12.)

THE BOARD AGENT'S DISMISSAL

The Board agent found that the charge failed to assert a prima facie violation because the matter must be deferred to arbitration pursuant to Dills Act section 3514.5, subdivision (a)(2)[3] and the Board's decision in Lake Elsinore School District (1987) PERB Decision No. 646. In Lake Elsinore, the Board held that identical language in the Educational Employment Relations

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(b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

[3]Section 3514.5, subdivision (a)(2) provides, in pertinent part:

> (a) . . . the board shall not . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . .

Act (EERA)[4] barred PERB from processing a charge if the grievance machinery of an agreement covered the matter at issue, resulted in binding arbitration, and the conduct complained of in the charge was arguably prohibited by the agreement.

In the present case, the parties' MOU, section 2.6 provides:

> The state and CAUSE shall not impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this contract.

This language is virtually identical to section 3519, subdivision (a) of the Dills Act. Article 6 of the MOU contains a grievance procedure that results in binding arbitration.

The Board agent concluded that the standards set forth by the Board in Lake Elsinore were met.

> First, the grievance machinery of the agreement/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that District Superintendent Fait denied Ranger Murphy the right to representation during an interview is arguably prohibited by Article 2, Section 2.6 of the MOU. . . .

(Warning letter, at p. 3.) He, therefore, held that the charge must be deferred to arbitration.

DISCUSSION

CAUSE contends that the Board agent erred in dismissing its charge because it believes that the matter is not subject to the

[4]EERA is codified at Government Code section 3540 et seq.

parties' MOU. It argues that the denial of Murphy's statutory right to representation did not amount to a reprisal, a threat of reprisal, a discrimination, or any interference, restraint or coercion because of his exercise of protected rights. We disagree.

The Board has held the denial of a right to representation to be a violation of provisions identical to section 3519, subdivision (a) of the Dills Act in its counterparts, the EERA and the Higher Education Employer-Employee Relations Act (HEERA).[5] (See Rio Hondo Community College District (1982) PERB Decision No. 260, at p. 19; Regents of the University of California (CSEA) (1983) PERB Decision No. 310-H, at p. 25.) Conduct which denies an employee the right of representation "interferes" with rights protected by these statutes.

The right to representation at investigatory interviews which the employee believes might lead to discipline arises out of employee rights protected by section 3515 of the Dills Act. Section 3515 provides, in pertinent part:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations....

[5]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Interpreting the EERA counterpart to section 3515,[6] PERB and the California Court of Appeal have held that employees are guaranteed the right to be represented by their employee organization at investigatory interviews where the employee reasonably believes that discipline may occur or in other highly unusual circumstances. (Redwoods Community College District (1983) PERB Decision No. 293, affd in part in Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617; see also, Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689]; Placer Hills Union High School District (1984) PERB Decision No. 377; Rio Hondo Community College District (1982) PERB Decision No. 272.)

PERB has also held that an employee organization has a concurrent right to represent employees at such investigations. (Redwoods Community College District, supra, PERB Decision No. 293, at p. 9; Rio Hondo Community College District, supra, PERB Decision No. 272, at p. 11; see also, Mt. Diablo Unified School District, et al. (1977) EERB[7] Decision No. 44.)

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[6]EERA section 3543 provides, in pertinent part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

[7]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

These cases were all decided prior to the Board's determination in Lake Elsinore School District, supra, PERB Decision No. 646, that section 3541.5 of EERA precluded the Board's jurisdiction over matters which also violated the parties' collective bargaining agreements and were covered by a grievance procedure culminating in binding arbitration. However, the Board has recently held that, where conduct allegedly violates both employee and employee organization rights, and the parties' collective bargaining agreement only prohibits the violation of employee rights, only the employee charge should be deferred. (State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S.)

In Department of Forestry, the employee organization alleged violations of its rights and those of employees arising from threats by the employer that, "if the union and that board don't quit screwing around with that contract, then there won't be a contract and CDF [the California Department of Forestry] will see to it." Pursuant to language in the parties' agreement which stated that "each employee retains all the rights conferred by section 3515, et seq. of the State Employer-Employee Relations Act," the Board determined that the allegation that the employer discriminated against the employees, in violation of section 3519, subdivision (a), must be deferred. The Board, however, reversed the Board agent on the issue of whether the employee organization's charge, that the employer's conduct violated its

rights, must be deferred. The general counsel was directed to issue a complaint on that issue.

CONCLUSION

Since the Board has regularly held that the denial of an employee's request for representation violates both the employee's statutory rights and those of the employee organization, consistent with the Board's position in Department of Forestry, supra. the Board affirms the Board agent's dismissal of the section 3519, subdivision (a) charge and reverses his dismissal of the section 3519, subdivision (b) charge.

ORDER

The dismissal of the section 3519, subdivision (a) charge is AFFIRMED; the dismissal of the section 3519, subdivision (b) charge is REVERSED and REMANDED. The general counsel is ORDERED to issue a complaint on the section 3519, subdivision (b) charge.

Members Shank and Camilli joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

March 6, 1990

Charlie Solt, Labor Representative
California Union of Safety Employees
915 20th Street
Sacramento CA 95814

Jeff Fine, Deputy Chief Counsel
Department of Personnel Administration
1515 S Street, North Bldg., Ste. 400
P.O. Box 944234
Sacramento CA 94244-2340

Re: California Union of Safety Employees v. State of California (Department of Parks and Recreation)
Unfair Practice Charge No. S-CE-443-S
DISMISSAL LETTER

Dear Mr. Solt:

The above-reference charge alleges that an agent of the State of California, Department of Parks and Recreation (DPR) refused to permit a union representative to attend a meeting between an employee and DPR's agent, which meeting the employee had a reasonable belief would result in disciplinary action, thereby violating Government Code sections 3519(a) and (b) (the "Dills Act").

I indicated to you in my attached letter dated February 20, 1990, that the above-referenced charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge or withdrew it prior to March 5, 1990, it would be dismissed.

I have not received either a request for withdrawal or an amended charge and am therefore dismissing the charge based on the facts and reasons contained in my February 20, 1990, letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Administrative Code, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Administrative Code, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Administrative Code, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Administrative Code, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

Michael E. Gash
Regional Attorney

MEG:djt

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198

February 20, 1990

Charlie Solt, Labor Representative
California Union of Safety Employees
915 20th Street
Sacramento CA 95814

Re: California Union of Safety Employees v. State of California (Department of Parks and Recreation)
Unfair Practice Charge No. S-CE-443-S
WARNING LETTER/DEFERRAL TO ARBITRATION

Dear Mr. Solt:

On January 24, 1990, you filed a charge in which you allege that an agent of the State of California, Department of Parks and Recreation (DPR) refused to permit a union representative to attend a meeting between an employee and DPR's agent; which meeting the employee had a reasonable belief would result in disciplinary action. Specifically, on or about October 12, 1989, Ranger I, Robert Murphy was questioned by his supervisor, District Superintendent William Fait, regarding several peace officer complaints. Prior to the interrogation Ranger Murphy requested union representation but was advised by District Superintendent Fait that union representation would not be allowed because the interview would not result in any documented punitive action.

Ranger Murphy then telephoned his union representative and advised him of the situation. The union representative telephoned District Superintendent Fait and was informed that the interview was to discuss a citation issued by Ranger Murphy and no formal action would result from the interview. Immediately prior to the interview, Ranger Murphy again requested representation which was again denied by District Superintendent Fait. Ranger Murphy was initially allowed to tape record this interview but was ordered to turn off the tape recorder prior to the conclusion of the interview. After Ranger Murphy turned off the tape recorder, District Superintendent Fait began to ask questions about other citizen complaints involving Ranger Murphy.

On or about October 19, 1989, Ranger Murphy received a documented corrective counseling interview signed by District Superintendent Fait. The documented corrective counseling interview states in pertinent part:

> No further action regarding this complaint is planned. If similar complaints are received regarding improper conduct on your part and after investigation judged to be valid within the next 12 months, this memorandum may be made an attachment to such corrective or adverse action as may be deemed necessary.

The Charging Party also alleges that this document was placed in Ranger Murphy's personnel file. The actions by District Superintendent Fait are alleged to have violated Government Code sections 3519(a) and (b) (the "Dills Act").

The parties to this unfair practice charge are signatories to a Memorandum of Understanding (MOU) currently in effect. Article 2 ("CAUSE RIGHTS") of that contract provides the following provisions;

> 2.6 No Reprisals
>
> The state and CAUSE shall not impose or threaten to impose reprisals on employees to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this contract.

Additionally, Article 6 of the MOU contains a grievance procedure which culminates in final and binding arbitration. Section 3514.5(a)(2) of the Dills Act states, in pertinent part, that PERB,

> shall not . . . issue a complaint against conduct also prohibited by the provisions of the . . . [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted either by settlement or binding arbitration.

In Lake Elsinore School District. (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to Section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Rule

32620(b)(5) (California Administrative Code, title 8, section 32620(b)(5)) also requires the investigating board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that District Superintendent Fait denied Ranger Murphy the right to representation during an interview is arguably prohibited by Article 2, Section 2.6 of the MOU. Section 2.6 of the MOU, specifically prohibits the State from interfering with employees "because of the exercise of their rights under the Ralph C. Dills Act. . . ." In this situation, if the conduct as alleged is true, then DPR would be in violation of section 3519(a) and (b) of the Dills Act, and thus in violation of a provision of the agreement between CAUSE and the State.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. See PERB Regulation 32661 (California Administrative Code, title 8, section 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, (1980) PERB Order No. Ad-81a.

If you feel that there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge accordingly. This amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before March 5, 1990, I shall dismiss your charge without leave to amend. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely,

Michael E. Gash
Regional Attorney

MEG:djt